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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JAMES BRADLEY FATCHETT,
12 Petitioner,
13 v.
14 STATE OF CALIFORNIA,
15 Respondent.

Civil No. 15-0525 LAB (JLB)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND
WITH LEAVE TO AMEND**

16 Petitioner, proceeding pro se, has submitted a Petition for Writ of Habeas Corpus
17 pursuant to 28 U.S.C. § 2254.

18 **PETITIONER IS NOT IN STATE CUSTODY**

19 Upon review of the documents filed in this case, it appears that Petitioner is not in
20 the custody of the State of California, nor was he when he filed the Petition because it
21 lists Petitioner's address as "299 17th Street, San Diego, CA 92101." Furthermore,
22 Petitioner does not allege he was on parole or otherwise in constructive custody.

23 "Subject matter jurisdiction under the federal habeas corpus statute, 28 U.S.C.
24 § 2254(a), is limited to those persons 'in custody pursuant to the judgment of a State.'" *Brock v. Weston*, 31 F.3d 887, 889 (9th Cir. 1994); see also 28 U.S.C. § 2241(c)(3). It
25 is a jurisdictional requirement that, at the time a habeas petition is filed, "the habeas
26 petitioner be 'in custody' under the conviction or sentence under attack." *Maleng v.*
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1 *Cook*, 490 U.S. 488, 490-91 (1989) (citing 28 U.S.C. §§ 2241(c)(3) & 2254(a)); *see*
 2 *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)).

3 Rule 4 of the Rules Governing § 2254 Cases provides for summary dismissal of
 4 a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits
 5 annexed to it that the petitioner is not entitled to relief in the district court. . . .” Rule 4,
 6 28 U.S.C. foll. § 2254. Here, it is plain from the Petition that Petitioner is not presently
 7 entitled to federal habeas relief because he was not in the custody of the State of
 8 California when he filed his § 2254 Petition in this Court.

9 **FAILURE TO NAME PROPER RESPONDENT**

10 If Petitioner is in custody, on parole, or on probation, review of the Petition reveals
 11 that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner
 12 must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v.*
 13 *Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254).
 14 Federal courts lack personal jurisdiction when a habeas petition fails to name a proper
 15 respondent. *See id.*

16 The warden is the typical respondent. However, “the rules following section 2254
 17 do not specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the
 18 warden of the institution in which the petitioner is incarcerated . . . or the chief officer in
 19 charge of state penal institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254
 20 advisory committee’s note). If “a petitioner is in custody due to the state action he is
 21 challenging, ‘[t]he named respondent shall be the state officer who has official custody
 22 of the petitioner (for example, the warden of the prison).’” *Id.* (quoting Rule 2, 28 U.S.C.
 23 foll. § 2254 advisory committee’s note). However, if a “petitioner is on probation or
 24 parole, he may name his probation or parole officer ‘and the official in charge of the
 25 parole or probation agency, or the state correctional agency, as appropriate.’” *Id.*
 26 (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note). In some cases, a
 27 petitioner may name the state attorney general. *Id.*

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1 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a
 2 writ of] habeas corpus against the State under . . . [whose] authority . . . the petitioner is
 3 in custody. The actual person who is [the] custodian [of the petitioner] must be the
 4 respondent.” *Ashley v. Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement
 5 exists because a writ of habeas corpus acts upon the custodian of the state prisoner, the
 6 person who will produce “the body” if directed to do so by the Court. H e r e ,
 7 Petitioner has incorrectly named “State of California,” as Respondent. In order for this
 8 Court to entertain the Petition filed in this action, Petitioner must name the person who
 9 will produce “the body” if directed to do so by the Court.

10 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

11 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases,
 12 Petitioner has failed to allege that his state court conviction or sentence violates the
 13 Constitution of the United States.

14 Title 28, United States Code, § 2254(a), sets forth the following scope of review
 15 for federal habeas corpus claims:

16 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall
 17 entertain an application for a writ of habeas corpus in behalf of a person in
 18 custody pursuant to the judgment of a State court only on the ground that he
 is in custody in violation of the Constitution or laws or treaties of the United
States.

19 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th
 20 Cir. 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v.*
 21 *Shimoda*, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal
 22 habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody
 23 pursuant to a “judgment of a State court,” and that he is in custody in “violation of the
 24 Constitution or laws or treaties of the United States.” *See* 28 U.S.C. § 2254(a).

25 Here, Petitioner makes various claims regarding the Department of Homeland
 26 Security, the San Diego Police, and alleges he is employed by the CIA, among other
 27 things. (*See* Pet. at 1-5.) In no way does Petitioner claim he is “in custody in violation
 28 of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal habeas claim and then refile the amended petition in this case. He must exhaust state judicial remedies before bringing his claims via federal habeas. State prisoners who wish to challenge their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. *See* 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court judicial remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.” *Id.* (emphasis added).

Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of limitation applies to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period runs from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

The Court also notes that the statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

FAILURE TO USE PROPER FORM

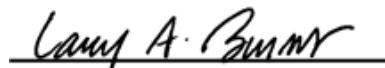
Finally, a Petition for Writ of Habeas Corpus must be submitted in accordance with the Local Rules of the United States District Court for the Southern District of California. See Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be submitted upon a court-approved form and in accordance with the instructions approved by the Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-approved form.

CONCLUSION

Based on the foregoing, the Court **DISMISSES** this action without prejudice and with leave to amend. To have this case reopened, Petitioner must, **no later than May 18, 2015**, file a First Amended Petition that cures the pleading deficiencies set forth above. ***The Clerk of Court is directed to mail Petitioner a blank First Amended Petition form together with a copy of this Order.***

IT IS SO ORDERED.

DATED: March 12, 2015



HONORABLE LARRY ALAN BURNS
United States District Judge